

Debate: Faction and the Environment

*Susan Rose-Ackerman, Second Panelist**

I want to point out a couple of things before getting to my main remarks. First, much of the discussion of the last couple of days concerning failures of substantive environmental policy and the weak relationship between means and ends expressed views that are widely shared across the ideological spectrum. We differ, however, on the role of the courts. Some think that the courts should impose reasonable substantive standards on the bureaucracy. Others urge review of the legitimacy of agency processes. Some conservatives want to restrict standing and limit the scope of judicial review. This last position has always seemed to me difficult to defend in the face of worries about bureaucratic overreaching. Much as we differ on process and the judicial role, however, we can all agree on the benefits of more cost-efficient environmental protection policies.

The second thing I want to say concerns the takings clause of the U.S. Constitution. The issue of regulatory takings is a complex and difficult topic, but however one analyzes the issue, the Constitution permits regulatory activities that impose costs on some people and gains on others. Policymaking under the American Constitution does not require unanimous consent. We have a majoritarian system that implies gainers and losers. We can argue about when losses should be compensated, but there is no general principle of American government that requires across-the-board compensation.¹

My main topic, however, is not substantive policy or compensation, but the inevitability of bureaucracy. As Cass Sunstein suggested in passing this morning, we need to link democracy and democratic values to bureaucratic choice.² We need to accept the fact that bureaucracies are not going to go away. Federalists may have a utopian dream of a magic kingdom in which there are not any bureaucracies, but that is not what we have and that is surely not what we are going to get in the environmental area any time soon.

The reason is fairly simple. The problems are too complicated, too based on science, technology, and economics, for legislation to be

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1. For a more detailed discussion, see SUSAN ROSE-ACKERMAN, *RETHINKING THE PROGRESSIVE AGENDA: THE REFORM OF THE AMERICAN REGULATORY STATE* 132-43 (1992).

2. Cass R. Sunstein, *Panel I: Liberty, Property, and Environmental Ethics*, 21 *ECOLOGY L.Q.* 455, 457 (1994).

self-executing. The statutes cannot be written in enough detail or with enough sensitivity to the facts to be carried out mechanically by the executive or the courts. There is going to be delegation.

Given delegation, bureaucratic processes must be democratically accountable. Democratic legitimacy is needed even though the bureaucratic process itself does not make choices by majoritarian methods. That is the strength of the Administrative Procedure Act (APA).³ The informal rulemaking portion of the Act sets out three basic principles.⁴ First, when an agency plans to issue a regulation, it has to tell the public. Notice must be general. Second, the agency has to be open to outside groups and individuals seeking both to explain who will be hurt or helped by the proposed policy and to present information relevant to the ultimate decision. Third, once the decision is made, the agency has to explain itself publicly. Unlike Congress, which does not have to explain itself, the agency has to state its reasons. The bureaucratic process is not a majoritarian process, but it is nevertheless political. One check on the political aspects of bureaucratic choice is publicity and transparency.

Furthermore, a bureaucracy cannot rely entirely on the information that comes in from outside. It is not like a court that only uses data provided by the parties to the case. An agency cannot base its decision on the submissions of interested parties alone. Not all interests that will be affected by the policy are well-organized and well-informed about the bureaucratic process. So the agency itself needs to have the scientific and social scientific capacity to understand the problem, figure out what is going on, and gather information. In other words, unlike a judge and jury, the agency should not depend entirely on the record of the hearings it holds.

Where do environmental groups come into this picture? Obviously, they are one type of group, along with industry groups, labor unions, and governments, that presents information to the bureaucracy in the policymaking process. I agree with the claim that environmental groups do not necessarily represent the public interest. What is the public interest anyway? There are many different publics. There are many different interests. Environmental groups represent a particular set of values.

Such groups represent very diffuse interests. Millions of people may agree with the position of a particular environmental group, but they suffer from a problem of organization, a free-rider problem. Why should they bother to get involved when other people could bear the cost? There is a collective action problem that is particularly sali-

3. 5 U.S.C. §§ 551-706 (1988).

4. *Id.* § 553.

ent for broad-gauged environmental interests compared with, say, a labor union or an industry trade association that is already organized. Environmental groups, even though they do not represent *the* public interest, are, nevertheless, representing a set of publics—a group of citizens, some of the public interest.

Since environmental interests have a collective action problem in organizing, agencies are justified in making an effort to hear from these groups. An agency might, for example, subsidize the groups' travel to Washington, or be sure that the groups are actually heard. Environmentalists represent important interests that need to be part of the process and need to be heard by the bureaucracy that is ultimately making the choice, but they suffer from organizational problems.

I want to distinguish this kind of process, in which the agency makes the ultimate choice on the basis of a broad-gauged open process, from what is sometimes called regulatory negotiation or "reg-neg." Reg-neg is currently having a little boom in the United States and Europe. It is the trendy thing to do. If reg-neg implies a process where representatives of all the groups negotiate a solution on the order of a labor-management negotiation, it is a poor model for most environmental problems. The reason is straightforward. Many of the people who are affected by the decision cannot be said to be well-represented in the sense that a labor union represents the interests of a worker or a trade association represents the interests of a member firm. Thus when I speak of subsidizing the participation of environmental groups in agency processes, I am not speaking about reg-neg but about more conventional agency rulemaking. I think there are many reasons to be very cautious about the widespread application of negotiated processes to the environmental area.⁵

Let me conclude with a few words about judicial review. Suppose the bureaucracy has been delegated policymaking responsibility. Who keeps them accountable to the public? This seems to me to be a role for the courts. In other words, the courts should not review the substance of the agency's choice, but, instead, should ask whether the agency followed procedures that were open and democratic, and whether it produced a decision that could be justified. It is here that I have difficulties with Justice Scalia's opinions mentioned by Michael Greve in his remarks.

After the plaintiffs are denied standing in the early sections of both *Lujan v. National Wildlife Federation*⁶ and *Lujan v. Defenders of*

5. For a more detailed discussion, see Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279 (1994).

6. 497 U.S. 871, 885-89 (1990).

Wildlife,⁷ Justice Scalia goes on to discuss other matters. In *National Wildlife Federation*, Scalia, in dicta, seeks to narrow the scope of preenforcement review of regulations. Then, in *Defenders of Wildlife*, Scalia casts doubt on the legitimacy of judicial review of high-level agency policymaking procedures. He distinguishes between review of such procedures and review of low-level agency procedures that may affect individual rights.⁸ If Scalia's language became accepted law, it would create serious problems. If the courts will not review the legitimacy of the procedures used within the bureaucracy, the bureaucracy may cut corners. Given the tension between democracy and bureaucracy, judicial review can play a constructive role.⁹

I agree with Michael Greve's assessment of Judge Williams' opinion in *International Union v. OSHA*,¹⁰ but I wish to clarify Williams' argument. In that case a regulated industry claimed that the Occupational Safety and Health Act¹¹ was unconstitutionally vague. The statute did not clearly tell the agency what it should be doing. Williams argues that the law does not violate the nondelegation doctrine so long as the agency can articulate principles (cost-benefit analysis or some other standard) that it uses to give structure to its actions.¹² The agency must not react to whichever interest group happens to scream most loudly. Williams' mixture of substance and procedure seems to me to express the appropriate role for the courts in maintaining the democratic legitimacy of the modern regulatory state. To assure this type of review, the courts should be generous in granting standing to citizens groups in order to permit the courts to review the policymaking processes of the bureaucracy.

7. 112 S. Ct. 2130, 2137-42 (1992).

8. 112 S. Ct. at 2142-43.

9. For a more extended discussion, arguing that the case should not be read to restrict the constitutional status of citizen suits, see Rose-Ackerman, *supra* note 5, at 1285-87.

10. 938 F.2d 1310 (D.C. Cir 1991).

11. 29 U.S.C. §§ 651-673 (1988 & Supp. IV 1992).

12. *International Union*, 938 F.2d at 1318-21.